law, most admirably illustrated in the majority judgment of Joubert ACJ in *Lever* (20I–26C). However, the law is not static and "to maintain the Roman-Dutch law in all its integrity, there must, in the ordinary course, be a progressive development of the law keeping pace with modern requirements" (per De Villiers CJ in *Henderson v Hanekom* (1903) 20 SC 513 519; see further *Blower v Van Noorden* 1909 TS 890 905; *Pearl Assurance Co v Union Government* 1934 AD 560 563; also s 39(2) of the Constitution, 1996; Hahlo and Kahn *The Union of South Africa: The development of its laws and constitution* (1960) 46–47). One could perhaps consider the defendant's attempt to persuade the court to extend the ambit of the second category of defence as an attempt to develop the law. The court correctly declined to do this, based on its conviction that the extension of that defence was not warranted because the existing principles governing the *actio de pauperie* are not unreasonable (*contra bonos mores*), nor unconstitutional. Furthermore, the court could justifiably find no practical reason for denying pauperian liability in a case such as the present.

The case of damage caused by a domestic animal resulting from the intentional or negligent causative conduct of a totally independent third person has now finally been resolved and has therefore lost its *res nova* status. This judgment is a strong pointer towards resolving the sole outstanding *res nova* issue – namely, the instance where the owner had transferred control of his or her animal to a third party and the animal afterwards inflicted harm which could not be blamed on the third-party controller's negligent conduct – in accordance with the proposals of Neethling, Potgieter and Scott 1014, namely, that the owner will not escape pauperian liability.

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PERMANENT STAY OF PROSECUTION

S v Brooks 2019 1 SACR 103 (NCK)

OPSOMMING

Permanente staking van vervolging

In hierdie saak het die applikante vir 'n permanente staking van vervolging aansoek gedoen met betrekking tot hul vervolging in 'n vroeëre strafsaak. Die aansoek is gebring as gevolg van die rekusering van die verhoorregter in die vroeëre saak en die Staat se voorneme om die applikante te herverhoor. Die Staat het vir doeleindes van artikel 342A van die Strafproseswet geargumenteer dat die aansoek prematuur was en die hof het daaroor beslis. In die vonnisbespreking ondersoek die outeur of artikel 342A toegepas moes gewees het en of die hof korrek was om die meriete van die vroeëre verhoor in ag te neem in sy beslissing of daar 'n onredelike vertraging was.

1 Background

In this case, the applicants applied for a permanent stay of prosecution before the Northern Cape High Court, Kimberley with regard to their prosecution in an earlier criminal case. The applications were triggered by the recusal of the trial

judge in the earlier case, and the intention of the State to retry the applicants (paras 1 5).

The State raised two questions *in limine*. The first question was whether the defence could apply "for a permanent stay of prosecution after the trial ha[d] indeed commenced and only a *de novo* trial ordered". The second question was

> "if the answer [was] yes and taking into account that the trial must now again start de novo, [could] the court take into consideration the merits in the 'previous' trial before the recusal of the presiding judge to decide whether or not there [was] an unreasonable delay or not?" (para 7).

The court decided to deal with the questions *in limine* along with the merit of the applications (para 8).

2 Events leading up to the application

The most relevant events leading up to the application were as follows: A State agent acting as a trap allegedly concluded several illicit diamond deals with *inter alia* the applicants (para 9). The State attempted to bring the illicit diamond deals and further actions by the applicants within the purview of the Prevention of Organised Crime Act 121 of 1998 (para 10).

The applicants were arrested in a high-handed and robust manner (para 11). Exorbitantly high amounts of bail were set at the request of the State and some applicants were compelled to bring formal bail applications (para 11). The first witness in the trial only testified two years later (para 12).

At trial the admissibility of the evidence of the trap was contested in a trial within a trial (para 9). In the trial within a trial some of the State witnesses fell ill during cross-examination and did not finish their testimony. The main State witness was also only scheduled to testify eighteen months after the start of the trial within a trial. However, this did not happen as the defence was informed that attempts had been made to bribe and threaten the presiding judge and a crucial State witness, and the applicants succeeded in an application for the trial judge to recuse herself (para 13).

An application in terms of section 342A(3)(c) of the Criminal Procedure Act 51 of 1977 (CPA) was brought by the accused before the start of the trial but was dismissed. In terms of section 342A(3)(c) the accused may apply that the case be struck from the roll, and that the case not be resumed or instituted *de novo* without the written instruction of the Director of Public Prosecutions, if there had been an unreasonable delay in the criminal proceedings which could cause the accused prejudice (para 14).

The applicants did not bring an application in terms of section 342A during the two years that the pre-trial procedures dragged on, or during the two years that the matter was on trial in the high court (para 14).

3 Decision

The court reacted with disbelief at the attempt by the State to bring the illicit diamond deals and further actions by the applicants within the purview of the Prevention of Organised Crime Act (para 10). The court also found the high-handed and robust manner in which the applicants were arrested sickening (para 11).

With regard to the application for a permanent stay of prosecution the court held that one would have expected the State to proceed with the case without delay but did not apportion all the blame to the State as some delay could be

ascribed to systemic delay and legal representatives not being ready to proceed (para 12).

Further particulars were also requested and provided within an agreed time frame between the State and the original accused persons. Some delay was also caused by some of the original accused who wanted to enter into plea and sentence agreements, some against whom the State did not proceed eventually. The indictment also had to be amended accordingly (para 12).

The court referred to the following portion of section 342A:

"**342A Unreasonable delays in trials**

(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:
   (a) the duration of the delay;
   (b) the reasons advanced for the delay;
   (c) whether any person can be blamed for the delay;
   (d) the effect of the delay on the personal circumstances of the accused and witnesses;
   (e) the seriousness, extent or complexity of the charge or charges;
   (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of costs;
   (g) the effect of the delay on the administration of justice;
   (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
   (i) any other factor which in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and prejudice arising from it or to prevent further delay or prejudice, including an order –
   (a) refusing further postponement of the proceedings;
   (b) granting a postponement subject to any such conditions as the court may determine;
   (c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the attorney-general;
   (d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence , as the case may be, has been closed . . .

(4) (a) An order contemplated in subsection (3)(a), where the accused has pleaded to the charge, and an order contemplated in subsection (3)(d), shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order."

The court added that the public interest also had to be considered when deciding what was fair. As authority the court referred to *National Director of Public*

Prosecutions v King 2010 BCLR 656 (SCA) para 5 which paragraph was quoted with approval in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* 2014 ZACC 3 para 71. The paragraph reads as follows:

> "Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the State . . . the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country . . . Courts should further be aware that persons facing serious charges – and especially minimum sentences – have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'. One can add the tendency of such accused, instead of confronting the charge, or attacking the prosecution." (emphasis added by the court in *Brooks*; para 28)

The court also referred to *S v Schaik* 2008 1 SACR 1 (CC) para 43 where the court held that a fair trial "ha[d] to instil confidence in the criminal justice system with the public, including those close to the accused as well as those distressed by the audacity and horror of crime" (para 28).

The court in referring to Du Toit *et al Commentary on the Criminal Procedure Act* (service 59) 33-29 pointed out that the principles in *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) were accepted to apply in considering an application in terms of section 342A(3) and that an application in terms of section 342A(3) could only be brought with regard to pending proceedings. The court also held that there was no such requirement with regard to an application with regard to a stay of prosecution (para 29).

The court also referred to section 35(3)(d) of the Constitution, 1996 which granted the applicants the right to have their trial begin and be concluded without unreasonable delay. The court held that section 35(3)(d) was not restricted to rights being infringed during "a criminal trial" (para 31).

The court then proceeded to summarise the case authority. In *Wild v Hoffert* 1998 2 SACR 1 (CC) the court held that granting a stay of prosecution was an extraordinary remedy. It prevented the State from proceeding with a worthy cause, that is, the prosecution of an accused in the public interest, especially where the alleged crimes were serious (para 32).

In *Zanner v DPP, Johannesburg* 2006 2 SACR 45 (SCA) the court held that compelling reasons to grant a stay would normally relate to trial-related prejudice. In this regard, the applicant had to show definitive and not speculative prejudice (para 33).

In *DPP v Phillips* [2012] 2 All SA 513 (SCA) the court ordered a permanent stay of prosecution of an appeal by the State due to an inexcusable inordinate delay in the execution of the appeal. The court held that a dismissal of the application for a stay would result in a retrial on the merits, a result that had to be prevented. The court in *Brooks* pointed out that as in *Phillips*, there was no pending case before the high court when the application for a permanent stay of prosecution was granted (para 34; however, see the court's contrary finding in para 64).

In *Van Heerden v NDPP* 2017 2 SACR 696 (SCA) the court referred extensively to *Sanderson* and added that whether there had been a breach of section 35(3)(d) depended on all the facts on a case-by-case basis.

In *Sanderson* the court explained that a balancing act had to be performed by a court considering an extraordinary remedy such as a permanent stay of execution. The Constitutional Court mentioned three factors to be considered, namely

> "(1) the right to a trial within a reasonable time is fundamental to the fairness of the trial and the consequent prejudice suffered by an accused if this does not materialise – see now s 35(3)(d) of the Constitution; (2) the nature of the case and (3) so-called systemic delay such as effectiveness of police investigation or prosecution of the case and delays caused by congested court rolls" (para 36).

The court in *Brooks* also quoted *Sanderson* paragraph 38 which reads as follows:

> "Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rule of conduct. That will seldom be warranted in the absence of significant prejudice to the accused."

The court also referred to the less drastic measures mentioned in *Sanderson* that were available to an accused in the event of a delay (para 37).

In *Bothma v Els* 2010 1 SACR 184 (CC) paras 67–87, with regard to an alleged offence that was committed many years earlier, the court held that the accused was presumed innocent and that the trial court would be obliged to give due weight to the evidential deficit facing the accused. The court in *Brooks* understood this to mean that the trial court had to ensure that the accused had a fair trial. The court also did not understand this to mean that the trial prejudice would be insurmountable, only that it would a significant factor to be taken into consideration when considering the guilt or innocence of the accused (para 38).

In *McCarthy v Additional Magistrate, Johannesburg* 2000 2 SACR 542 (SCA) paras 41 45 46 and *Porrit v The State* SS 40/2016 (GSJ) (22 April 2016), the delaying tactics of the accused were recognised. In both cases the accused held the State at bay for a considerable time before claiming prejudice as a result of the delays (para 38).

In evaluating the application the court in *Brooks* found that the prejudice to the applicants which were not trial-related played a relatively insignificant role. The court nonetheless briefly listed the uncontested non trial-related prejudice that the applicants relied upon (para 44).

The court also held that the recusal of a presiding officer even in the event of a long criminal trial was not a free pass for a successful application for a stay of prosecution, notwithstanding the fact that the accused suffered prejudice. The court was also mindful of the fact that accused may especially during long trials deliberately orchestrate a ploy to have the presiding officer recuse him- or herself in order to apply for a permanent stay of prosecution. However, the court found no basis for such a finding in this case (para 47).

The court furthermore found an analogy between the relief sought in terms of section 342A(3)(a) and (d) where the State's case is deemed closed when the State is unable to proceed, and a permanent stay of prosecution, and considered the authorities referred to by *Du Toit et al* pertaining to section 342A(3) (para 48).

The court found that *Hoffert*, *Sanderson* and *Bothma* were distinguishable from the matter before the court and pointed out the many worrisome issues with regard to the State's case. The court found at least one of these issues to be incomprehensible and irreparable and another issue damning (paras 49ff).

The court did not agree with the contention by the State that these matters were irrelevant for the application as it dealt with the merits of the case and it was for the trial judge to decide. The court pointed out that the versions of the applicants were left unchallenged in that regard and with regard to several other crucial issues (para 55).

The court found that the camel's back has been broken and that there could be no fairness in allowing the State another bite at the cherry (para 57). The court also found that there were no suitable less drastic measures available to the applicants and that the lesser measures mentioned in *Sanderson* were unrealistic *in casu* (para 58). The court opined that it was sometimes necessary for a court to protect the integrity of its own processes and to take the required steps to avoid injustices (para 62).

In closing, the court reiterated that a balance had to be struck in considering the three factors set out in *Sanderson*. The court noted that it had considered the societal demand that an accused should stand his trial, particularly in the event of serious crimes as *in casu*, but that it weighed that with the prejudice already suffered and to be suffered, both trial-related and not trial-related by the applicants, if a *de novo* trial was allowed to proceed.

The court also noted that it had considered the State's *in limine* submission that the application was premature as there was no pending case as the *de novo* trial had not yet started. The court found this to be a red herring as the indictment still stood and the State had made it clear that it wanted to start *de novo*. All the applicants were still on bail and no charges had been withdrawn. There was therefore no reason to wait any longer.

With regard to the second point *in limine* the court indicated that it did not consider the merits of the "previous" trial save insofar as the parties expressly dealt with particular aspects thereof in the application for a stay of prosecution (para 64). The court held that the applicants should not be subjected to another trial and ordered the prosecution permanently stayed (paras 65 66).

Finally, the court also confirmed that once a presiding officer had recused her- or himself the trial becomes a nullity, which opened the way for a fresh trial. The court referring to *S v Sulliman* 1969 2 SA 385 (A) 390ff also held that although it did not agree with the decision of the trial court to recuse, the recusal although causing hardship and financial prejudice to the applicants, could not be regarded as irregular or a failure of justice (paras 25 26).

4 Discussion

In this case, the State argued that the application was premature as there was no pending case (for purposes of s 342A; see the first point *in limine* para 7 read with paras 29 64). The court, while finding that a pending case was not required where the applicants applied for a stay of prosecution in terms of section 35(3)(d) (paras 29 31 34), nonetheless considered the states argument, and made a finding (para 64). In this discussion, the author investigates whether section 342A should have been applied and whether the court was correct to take into account the merits of the previous trial when deciding whether or not there was an unreasonable delay.

4 1 Should section 342A have been applied?

There is little doubt that section 342A was promulgated to give effect to and assist in the practical application of the constitutional imperative first included in section 25(3) (a) of the Interim Constitution, and thereafter in section 35(3)(d) of the Constitution, 1996 (see also Curry and De Waal *The Bill of Rights handbook* (2013) 798; Du Toit *et al Commentary on the Criminal Procedure Act* (loose-leaf updated to July 2018) 33-29 where it is indicated that such a statutory mechanism was first mooted by the South African Law Commission in the *Interim report on the simplification of criminal procedure* (project 73 of August 1995)). As has been indicated, section 35(3)(d) provides that every accused person shall have the right to a fair trial, which includes the right to have his or her trial begin and conclude without unreasonable delay.

However, it is also clear that section 342A only applies to the court dealing with the *intra curial* delay in the criminal proceedings before that court (with the exception that a superior court may intervene where the lower court which is seized with the case does not have jurisdiction to try the case (see s 342A(1) and (6)). Therefore, it is submitted that section 342A should not have been applied by the court in *Brooks* where a different court was approached for a stay of prosecution on a notice of motion.

There is also much scope for the argument that section 342A does not give effect to or assist in the application of section 35(3)(d) in all respects.

In terms of section 342A(3) the court may, if it finds that the completion of the trial is being delayed unreasonably, issue such order it deems fit "in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice". The applicable court is thus authorised to make any order it deems fit: to eliminate any delay and any prejudice arising from it; to prevent further delay; or to prevent further prejudice. If the ordinary literal meaning is attached to the text, and effect is given to every word (see Botha *Statutory interpretation: An introduction for students* (2012) 91 113) the applicable court is accordingly authorised in terms of section 342A(3) to order a stay of prosecution to prevent further prejudice.

However, despite the persuasiveness of this contextual approach it creates an incongruity when considering section 342(3) along with section 342(4). In terms of section 342(3)(a)–(c) the applicable court may, where the accused has not pleaded refuse a further postponement of the proceedings, grant a postponement subject to conditions, or order that the case be struck from the roll and the prosecution not be presumed or instituted *de novo* without the written instruction of the Director of Public Prosecutions.

Because the accused has not pleaded these remedies are not decisive or fatal to the State or the defence case (depending against whom the order is made).

However, where the accused has pleaded to the charge the applicable court may not refuse a further postponement of the case in terms of section 342A(3)(a), or deem the case of the State or the defence closed where the relevant party is unable to, or refuses to, proceed in terms of section 342A(3)(d), unless the requirements in section 342A(4) have been complied with.

Section 342A(4) provides that these orders may not be issued unless exceptional circumstances exist, all other attempts to speed up the process has failed, and that the party applying for such remedy gave notice beforehand that it intends to apply for such remedy.

This makes good sense as an order in terms of section 342A(3)(a) where the accused has pleaded, and an order in terms of section 342A(3)(d) may well be fatal to the party's case against whom the order is given, even though the court may still be able to make a finding on the evidence before it.

This is where the incongruity arises. If the applicable court is authorised in terms of section 342A(3) to order a permanent stay of prosecution, it may do so without complying with the requirements in section 342A(4). In such event, the remedy is fatal without more to the State case.

The legislature therefore provided that the applicable court may only make certain orders where such orders may prove to be fatal to the affected party if specific requirements are met, yet where the order is one of a permanent stay of prosecution, which will most certainly be fatal to the case of the State, the requirements do not have to be met.

This could not have been the intention of the legislature and the position should be taken that section 342A does not provide authority for the applicable court to order a stay of prosecution (see in this regard Botha 91; and *Venter* 1907 TS 910 914 and where it was held that one may deviate from the literary meaning of legislation to avoid an absurdity. See also *S v Steward* 2017 1 SACR 156 (NCK) para 6 where the full bench also appears to hold the view that an application for permanent stay of prosecution is distinct from inquiries conducted in terms of s 342A.)

Moreover, section 35(3)(a) will also not apply in all instances that section 342A applies. Section 35(3) rights only accrue to an accused person. It does not, for example, provide protection where the case is on appeal or review. A person on appeal or review is not an accused. Such person is not accused of a crime, he or she has been convicted of a crime (see also Curry and De Waal 751; and *Khosana v NDPP* 2012 1 SACR 176 (FB) where it was held that fair trial rights accrue when the guilt or innocence of an accused is decided). Section 35(3)(d) rights furthermore lapse when the trial has been concluded. However, see also *Director of Public Prosecutions v Phillips* 2012 4 SA 513 (SCA) where the Supreme Court of Appeal confirmed the order by the high court *a quo* for the permanent stay of an appeal based on the infringement of the applicant's section 35(3)(d) rights. Section 342A is not so limited and may be implemented during any pending criminal proceedings.

It follows that in an application for a permanent stay of prosecution section 342A will not apply. As such, section 342A only gives effect and practical application to section 35(3)(d) where the criminal proceedings are pending before that court, the applicant is an accused and the trial has not been concluded (see the limitations in s 35(3)(d)).

If it is accepted that section 342A did not apply, it accordingly did not matter whether there were "pending criminal proceedings" for purposes of section 342A. Yet, it still had to be decided whether the applicants were accused persons, and that the trial had not been concluded for section 35(3)(d) to apply.

In this case, the matter had been part heard when the presiding officer recused herself. The State had also indicated its intention to prosecute the applicants in a new criminal trial. The court furthermore held that the indictment still stood, the applicants were all on bail, and no charges had been withdrawn (para 64).

It is trite law that where the presiding officer recused him or herself the whole trial became void and a nullity (*Magubane v Van der Merwe* 1969 2 SA 417 (N);

Joubert *et al Criminal procedure handbook* (2017) 264; Du Toit *et al* 15–41). Yet, the recusal did not void the charges against the accused. Because the charges had not been withdrawn the applicants were still accused persons. The trial had also not been concluded. The applicants accordingly complied with the requirements to bring an application for a permanent stay of prosecution under section 35(3)(d).

The fact that the court deliberated whether the applicants complied with the requirements under section 342A, and not under section 35(3)(d), therefore did not make a difference in this instance.

4 2 Was the court correct to take the merits of the discontinued trial into account?

Perhaps a more difficult issue was whether the court was correct to take the merits of the previous discontinued trial into account when deciding whether or not there was an unreasonable delay.

The first important point is that the court did not consider the merits of the previous partly-heard matter save insofar as the parties dealt with the aspects in the application for a stay of prosecution, and the flaws in the State case that were taken into account were unchallenged. Under these circumstances, the evidence is reliable enough to be considered in the application (if the evidence is not reliable enough the evidence will not be able to prove or disprove that the delay had been unreasonable; see s 210 of the CPA and Schwikkard and Van der Merwe *Principles of evidence* (2016) 49.

Yet, that is not the end of the story. The question remains whether the merits of the discontinued State case are otherwise relevant to the adjudication of an application under section 35(3)(d). The adjudication of an application under section 35(3)(d) in the first instance necessarily requires an assessment as to whether there has been a delay and the reasons for the delay (see *Sanderson* 28ff; *Bothma v Els* 2010 1 BCLR 1 (CC)); *Barker v Wingo* 407 US 514 532 (1972) 530 under American law; and *R v Morin* (1992) 8 CRR (2d) 193 204 under Canadian law). The questionable merits of the discontinued State case cannot contribute to the delay and the merits of the discontinued State case are accordingly irrelevant when considering whether there has been a delay.

However, the Constitutional Court in (*Sanderson* para 22ff) took a broad and open-ended approach to the interpretation of the right to a speedy trial in the Constitution and held that there were three kinds of interests to be the protected by the speedy trial provision. These interests were liberty, security and trial-related interests (see also *R v Morin* 202; *Rahey v R* [1987] 1 SCR 588 39 DLR (4th) 481; *R v Potvin* [1993] 2 SCR 880, 105 DLR (4th) 214 under Canadian law and *Barker v Wingo* under American law).

The Constitutional Court in *Sanderson* para 24 also held that the right to a trial within a reasonable time sought to make the trial more fair and as such also aimed to minimise non-trial-related prejudice suffered by the accused. (See also *S v Zuma* 1995 2 SA 642 (CC); 1995 4 BCLR 401 (CC) para 16 where the earlier Constitutional Court in interpreting s 25(3) of the Interim Constitution held that criminal trials had to be conducted in accordance with open-ended notions of basic fairness and justice.)

It follows that if there had been a delay, the liberty, security, trial related interests and non-trial-related prejudice are assimilated in determining whether or not the lapse of time was unreasonable for purposes of an application under section 35(3)(d). This requires a value judgement (*Sanderson* para 36).

On the face of this, the merits of the State case may well be relevant to the adjudication of an application under section 35(3)(d). It may be argued that prosecuting a person on questionable merits infringed the applicant's right to security and aggravated the non-trial prejudice suffered. It may furthermore be argued that it is unreasonable, and there can be no fairness in having the applicants carry the profound burdens of another trial, while there is no reasonable prospect of a successful prosecution.

However, the situation under South African law is not that clear cut. In *Sanderson* the Constitutional Court found the interests of "liberty, security and trial-related interests" espoused by the Canadian Supreme Court to be applicable (see *R v Morin, Rahey v R* and *R v Potvin* under Canadian law). Under South African law the Interim Constitution instead provided in section 11, and the Constitution, 1996 instead still provides in section 12, for the right to "freedom and security" with "freedom" being the functional equivalent of "liberty" in the Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11.

Be that as it may, what makes the situation unclear is that the Constitutional Court has on at least two other occasions erected a conceptual wall between the right to freedom and security (s 11 IC and s 12 Constitution, 1996), and the rights of persons once arrested, detained or accused (s 25 IC and 35 Constitution, 1996).

In *Ferreira v Levin NO, Vryenhoek v Powell* 1996 1 SA 984 (CC) the majority held that the primary, though not necessarily the only, purpose of section 11(1) of the Interim Constitution was to ensure the protection of the physical liberty and physical security of the individual. However, the majority also accepted that section 11(1) had a residual content and that in appropriate cases it may protect fundamental freedoms not enumerated elsewhere in The Bill of Rights. In *De Lange v Smuts* 1998 3 SA 785 (CC) the same court read section 12(1) in the Constitution, 1996 in much the same way as it read the former section 11(1).

Because *Ferreira* and *De Lange* specifically deliberated the interaction between right to freedom and security, and the rights of persons once arrested, detained or accused in the Constitutions, these decisions must be followed. It follows that because the right to have your trial begin and be concluded without unreasonable delay is specifically catered for in section 35(3)(d), the residual right to procedural fairness in section 12 will not be activated. The persuasive doctrines and principles of freedom and security, therefore, cannot be utilised under South African law in determining whether or not the lapse of time was unreasonable for purposes of an application under section 35(3)(d).

Having said that, it may be possible to consider the merits of the discontinued trial for purpose of an application under section 35(3)(d) solely due to the fact that section 35(3) bestows on all accused the right to a fair trial. The Constitutional Court in *Zuma* has furthermore in interpreting section 25(3) reiterated that all criminal trials had to be conducted in accordance with open-ended notions of basic fairness and justice. It may accordingly, based on section 35(3) alone, be argued that it is unreasonable, and that there could be no fairness in having the applicants bear the profound burdens of another trial, while there is no reasonable prospect of a successful prosecution.

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